United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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P/S

75-1227

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

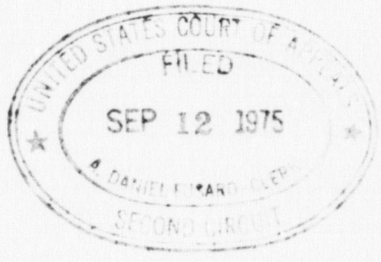
SIR KUE CHIN,

Appellant.

Docket No. 75-1227

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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I

The District Judge found as a fact that the Government's proof established two conspiracies, one between Wong Lim and appellant, the other between Mong Wong and appellant (376, 381-382). The Government attempts to refute this fact by citation to cases which are inapposite because they involve chain conspiracies (Br. 6-8*).

*"Br." followed by numbers refers to pages of the Government's brief.

The facts here are insufficient to show a chain conspiracy since there was no proof, as required, of well-defined roles in a highly structured, disciplined, and vertically integrated criminal enterprise. United States v. Sisca, 503 F.2d 1337, 1345 (2d Cir. 1974); United States v. Bynum, 485 F.2d 490, 495 (2d Cir. 1973).

> The pattern is now familiar. Raw drugs in large quantities have to be imported and supplied. In this case [Bynum] the core operators ... supplied the capital and the contact with the suppliers who provided the raw material. The raw drugs then had to be adulterated or cut, packaged and then resold to purchasers who eventually made them available to the victims.
>
> United States v. Bynum, supra, 485 F.2d at 495.

Thus, it is the large scale and scope of the operations in a chain conspiracy which permit certain inferences to be drawn. United States v. Miley, 513 F.2d 1191, 1207 (2d Cir. 1975).* Accord, United States v. Agueci, 310 F.2d 817, 827 (2d Cir. 1962); United States v. Sisca, 503 F.2d 1337, 1345 (2d Cir. 1974); United States v. Bynum, supra, 485 F.2d at 496; United States v. Tramaglino, 197 F.2d 928, 930 (2d Cir. 1952).

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*The Government attempts to distinguish this Court's decision in Miley because of the place of manufacture of the substance involved and the amount of money contemplated in negotiations here (Br. 8). These facts are insufficient to distinguish Miley, since they are not critical to the central question of scope and structure of the criminal enterprise alleged.

Not having proved a chain conspiracy, these inferences are inapplicable here. Therefore, in order to find one conspiracy, the Government was required to show by affirmative proof that one conspiracy existed between appellant, Mong Wong, and Wong Lim. The Government did not do this, and the District Court's ruling that there were two conspiracies is correct.

II

The Government's assertion that defense counsel's conduct and cross-examination were not influenced by the variance (Br. 10) is refuted by an examination of the trial transcript. Pages 161-163 of the transcript make clear that it was only counsel's cross-examination which established that there were two conspiracies. While it is true that the jurors were aware of Mong Wong as a result of the Government's case, they did not learn of Wong Lim until cross-examination. Moreover, knowledge of Mong Wong is irrelevant to the question of the existence of multiple conspiracies and Mong Wong's participation in only one of them.

III

The Government's argument that the theory of the case presented to the grand jury and that presented at trial were the same is factually incorrect. The pertinent grant jury testimony clearly shows that the grand jurors were told that appellant had a single supplier involved in one conspiracy:

> Q. During the course of the conversations between Mr. Chin and the agent and Mr. Chin and the informant, either one, did Mr. Chin mention that heroin which he was proposing to sell was coming from another person other than himself?
>
> A. Yes, he did.
>
> Q. Did he give the name of that person?
>
> A. Yes, he did.
>
> Q. All right, I will ask the Foreman to excuse you.
>
> Appellant's Separate Appendix "D" at 6. Emphasis added.

In contrast, the trial testimony showed two suppliers involved in separate conspiracies. This being so, evidence of the Mong Wong conspiracy was improperly before the jury (see appellant's main brief at 11-13).* The Government cannot now rely, as it does, on the error of admitting this

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*Ironically, while attempting to argue that the theory of the case presented at trial was the same as that presented to the grand jury, the Government highlights the prejudice suffered by appellant. The Government argues that "the court's failure to read Overt Act 5 to the trial jury did not remove from their consideration the existence or sig-

evidence to mitigate the impermissible amendment of the indictment.

IV

The Government rejects appellant's argument that the procedure utilized here violated the protection afforded by the double jeopardy clause by citing United States v. Mallah, 503 F.2d 971 (2d Cir. 1974). In Mallah, this Court reversed a conspiracy conviction on double jeopardy grounds because the Government failed to show that two conspiracies, charged in different trials, were not, in fact, one. United States v. Mallah, supra, 503 F.2d at 986). Mallah is inapposite to the situation here since the District Judge has ruled that two conspiracies were shown, and it is unclear what the jury's decision reflects and what additional charges

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(Footnote continued from the preceding page)

nificance of the December 20 meeting alleged in it." (Br. 13). In fact, the presence of this testimony about the Mong Wong conspiracy is part of the problem in this case (see appellant's main brief at 11-13). The prejudice of this extraneous evidence could not be clearer since the Government itself admits that it argued the December 20 meeting with Mong Wong to the jury as proof of a single conspiracy (Br. 14), even after the District Judge had ruled that there were two conspiracies and that the Mong Wong conspiracy was not to be submitted to the jurors.

appellant may be subject to in accordance with the double jeopardy clause.

CONCLUSION

For the foregoing reasons and the reasons set forth in appellant's main brief, the judgment of conviction should be vacated and a new trial granted on Count II of the indictment. Count I should be dismissed with prejudice.

Respectfully submitted,

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Certificate of Service

September 12 , 1975

I certify that a copy of this reply brief has been mailed to the United States Attorney for the Southern District of New York.

Barbara J. Silbermann